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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Office of Pr. Hearings

MAY 23 2011

Part of
Public Record

STB EX PARTE NO. 684

**SOLID WASTE RAIL TRANSFER FACILITIES
REVISED INTERIM RULES WITH REQUEST FOR COMMENTS**

**COMMENTS OF THE NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION AND
THE NEW JERSEY MEADOWLANDS COMMISSION**

The New Jersey Department of Environmental Protection ("NJDEP") and the New Jersey Meadowlands Commission ("NJMC") (collectively referred to as "New Jersey") submit these comments to the Surface Transportation Board ("Board") in the above captioned Rulemaking. The Clean Railroads Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 ("Clean Railroads Act" or "CRA") amended 49 U.S.C. § 10501 to provide specifically that states have jurisdiction to regulate solid waste rail transfer facilities, 49 U.S.C. §§ 10501(c)(2), 10908(a), 10908(b), and to limit the Board's authority to the issuance of land use exemption permits, 49 U.S.C. §§ 10908(b)(2)(B) and 10909(a). The CRA required the Board to establish procedural rules for the submission and review of land use exemption permit applications. Id. at 10909(b).

On January 14, 2009, the Board issued a notice of proposed rulemaking and interim rules, published in the Federal Register on January 27, 2009. 74 Fed. Reg. 4,714 (Jan. 27, 2009). The Board received comments, and proposed changes to its interim rules based on the comments received and further evaluation by the Board. 76 Fed. Reg. 16,538 (March 24, 2011) and STB Decision, Docket No. EP 684 (Service Date March 24, 2011) (hereinafter referred to as "Decision"). New Jersey submits the following comments on the Board's revised interim rules.

1. General comments

New Jersey generally supports the Board's revised interim rules. As the agencies charged with the implementation and enforcement of environmental, public health and safety laws and the management of natural resources in New Jersey, NJDEP and NJMC appreciate the Board's consideration and in many instances, agreement with, the agencies' comments and suggestions. Historically, NJDEP and NJMC experienced many difficulties with facilities that under the guise of a "rail carrier" handled solid waste without proper environmental, public health or safety controls,

while claiming that they were subject to no State oversight due to alleged federal preemption. Such facilities and actions adversely impacted the health and safety of the people of New Jersey as well as New Jersey's resources and environment. With the CRA, solid waste rail transfer facilities may no longer claim blanket federal preemption of State environmental and health and safety laws and thereby seek to evade necessary State environmental regulation and oversight.

With this background, NJDEP and NJMC support the Board's new proposed § 1155.21(13) through (16), which require an applicant for a land-use-exemption permit to explain how the facility comes under the Board's jurisdiction and how the facility meets the definition of a solid waste rail transfer facility, and to identify the owner and operator of the facility as well as the interest of the rail carrier in the facility. New Jersey further supports the Board's new requirement at § 1155.21(a)(7) that an applicant state whether the law from which exemption is sought is an environmental, public health or public safety standard that falls under the state's traditional police power, and for an explanation if the applicant or interested party claims it is not. NJDEP's responsibility to regulate solid waste and enforce the solid waste laws in this State stems from the the State's traditional police powers to regulate for the public's health and safety, and the State's longstanding authority to regulate solid waste activities. NJMC oversees development in the Hackensack Meadowlands District, an area of approximately 21,000 acres of salt water swamps, meadows and marshes which "need special protection from air and water pollution and special arrangements for the provision of facilities for the disposal of solid waste." N.J.S.A. 13:17-1. Among other things, NJMC is authorized to implement and enforce building codes and standards, which are fundamental to protecting public safety. Accordingly, NJDEP and NJMC appreciate the Board's recognition of the states' traditional police powers, and anticipate that the Board's consideration of land-use-exemption permit applications will give due deference to the states' exercise of their long-standing police powers to protect the public health and safety.

New Jersey also agrees with revised § 1155.26(b)(4) regarding applications from non-rail carriers. New Jersey further appreciates the Board's clarification regarding enforcement of a state law even if a Board proceeding is pending (Decision at 14) and a facility's obligation to comply with state laws, orders, regulations and requirements (Decision at 23).

2. Scope of a land-use-exemption permit

In the Board's Decision, the Board explained that the rules are being revised to require the applicant to identify only those laws affecting siting for which the facility seeks an exemption. (Decision at 5.) The Board explained that "[u]ltimately, a land-use-exemption permit would only exempt a facility from complying with laws, regulations, and orders affecting the siting that are specified in the permit." (Id.) The Board explained that it "will" require the applicant to comply with all other laws, regulations, orders, or requirements affecting the siting of the facility. (Id. (citing 49 U.S.C. § 10909(f)).)

However, revised § 1155.26(d) still states that if a land-use-exemption permit is granted, "all State laws, regulations, orders, or other requirements affecting the siting of a facility

are preempted with regard to the facility” (emphasis added). Although the next sentence in § 1155.26(d) appears to qualify the reach of the first sentence, the revised language does not reflect the Board’s explanation of its intent. Rather, by including the language “unless the Board determines otherwise” at the end of the second sentence of § 1155.26(d), the Board appears to reserve discretion to extend the scope of a land-use-exemption permit beyond what an applicant may require. Moreover, the language “unless the Board determines otherwise” is not included in the Board’s explanation of its proposal. See Decision at 5 (explaining that revised 49 C.F.R. § 1155.26(d) now states that “[a] Board issued land-use-exemption permit will require compliance with such state laws, regulations, orders, or other requirements not otherwise expressly exempted in the permit.”) Thus, the language of revised § 1155.26(d) does not reflect the Board’s explanation of its proposed revision.

NJDEP and NJMC agree that any Board issued land-use-exemption permit may and should exempt only the particular law affecting siting for which the facility seeks an exemption, as the Board itself proposed. Therefore, the Board should revise § 1155.26(d) to reflect the Board’s intent.

3. Environmental and/or historic reports and Environmental Impact Statement

In its Decision, the Board explained that it determined that the CRA rules should include environmental procedures designed to develop the environmental record in proceedings for a land-use-exemption. (Decision at 7.) The Board concluded that an Environmental Impact Statement (EIS) generally should be prepared for each such application. New Jersey supports this determination because of the many and varied environmental impacts associated with these types of facilities. However, revised § 1155.21(c), Environmental impact, states that “[t]he applicant shall certify that it has submitted an environmental and/or historical report... if an environmental and/or historic report is required” (emphasis added). New Jersey believes that this qualification is not consistent with the Board’s explanation or determination, and conflicts with § 1155.20(c), which requires an application to submit an environmental and/or historic report, at least 45 days prior to filing an application. New Jersey thus requests that the Board delete from § 1155.21(c) the language “if an environmental and/or historic report is required.”

4. “Existing” solid waste rail transfer facilities under the CRA

In the Board’s Decision, the Board summarized concerns expressed by some of the parties “that an existing facility could operate sporadically to potentially evade review by the Board.” (Decision at 15.) The Board has proposed a new subsection at § 1155.12(b), to attempt to address this concern. New Jersey believes that the Board’s proposed new subsection would alleviate the articulated concern.

5. Miscellaneous

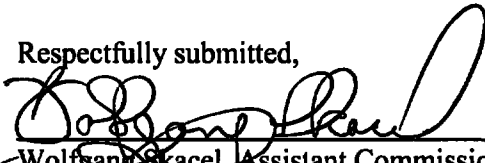
In the Federal Register notice and Decision attaching as Appendix A the proposed


revised interim rules, the Board presented only the revised rules in their entirety. The Board did not track its proposed revisions to the rules by offering the rules with a "strike-out" through the language the Board proposed to delete and highlighting in "bold" language the Board proposed to add. New Jersey suggests that in future rulemaking proceedings, the Board clearly depict its revisions by using such formatting tools, so that interested parties may readily identify the proposed rule revisions.

New Jersey notes one apparent typographical error. Section § 1155.21(c) references § 1155.25(b). It appears however that the reference should be to § 1125.24(b).

6. Conclusion

New Jersey appreciates this opportunity to submit comments on the Board's revised interim rules.

Respectfully submitted,
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Dated: May 23, 2011